No. 21[illegible] 57

FILED
APR 7 1902
[illegible]
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

No. [illegible].

METCALF BROTHERS & COMPANY,

Petitioners.

Filed April 7, 1902.

BENJAMIN BARKER, Jr., Trustee in bankruptcy of LESSER BROTHERS,

Respondent.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

NELSON S. SPENCER,
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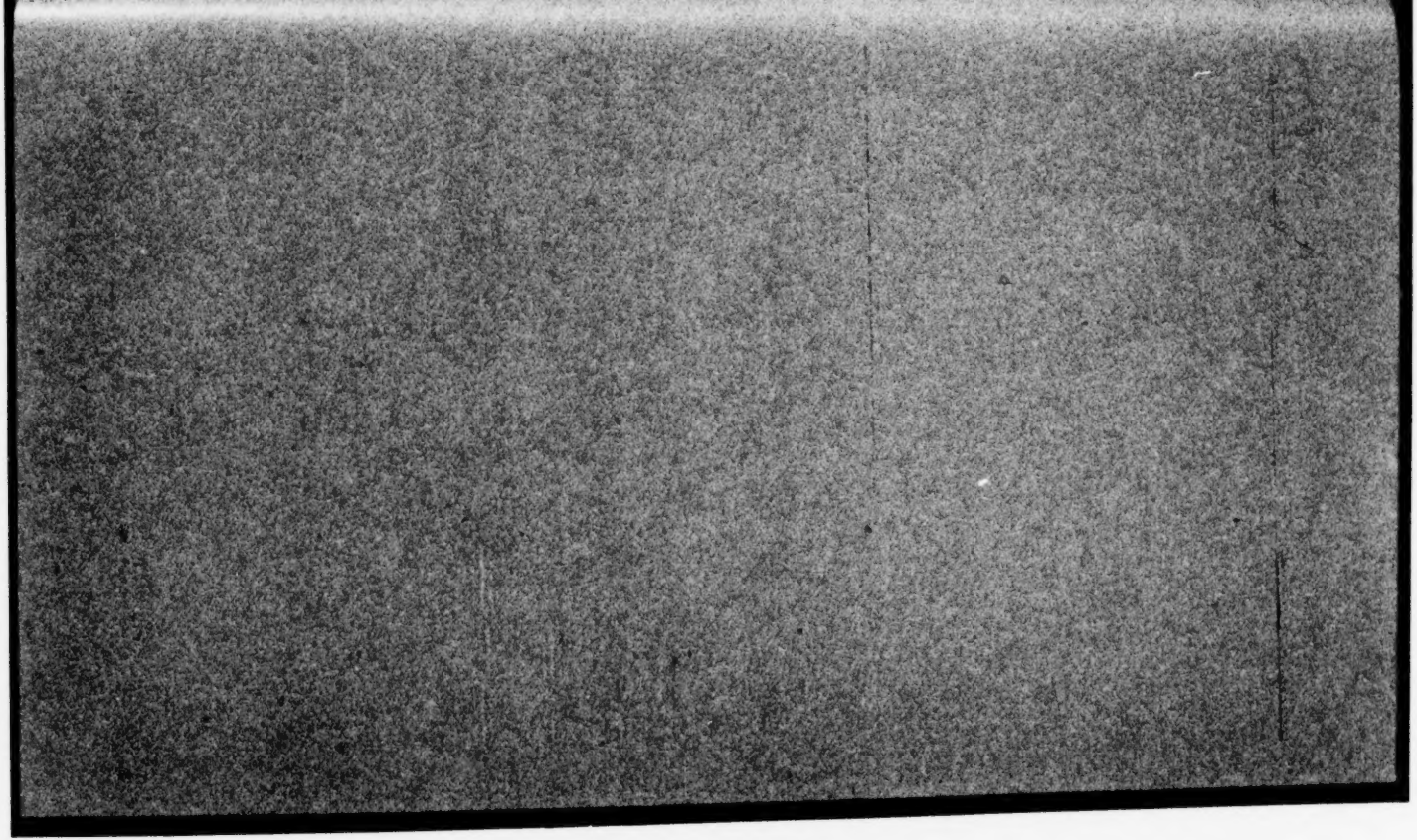

In the Supreme Court of the United States.

METCALF BROTHERS & COMPANY, Petitioners.	
AGAINST	October Term, 1901.
BENJAMIN BARKER, JR., Trustee in Bankruptcy of LESSER BROTHERS, Respondent.	No. 269.

Brief for Petitioners.

This matter comes to this Court upon a certificate of the United States Circuit Court of Appeals for the Second Circuit.

THE STATEMENT OF THE CASE

contained in the certificate is as follows:

On the 2d of October, 1896, Lesser Brothers, subsequently adjudged bankrupts, who were co-partners, being then insolvent, transferred all their property, copartnership and individual, to certain favored creditors. All their outstanding accounts, being co-partnership property, they transferred by instruments of assignment to Marcus A. Adler and others. They confessed various judgments in the supreme court of the State of New York in favor of Bernhard Moses and others, upon which executions were at once issued to the sheriff of the county of New York, who levied thereunder on all

their tangible personal property, consisting of clothing material and stock in trade. This also was co-partnership property, and, with the book accounts, comprised all their property except a piece of real estate owned by Israel Lesser individually and a ground lease of another piece of real estate owned by Tobias Lesser individually. These two pieces of real estate the individuals owning them conveyed to Joseph Lilianthal.

After making these transfers and after the levy by the sheriff under the executions issued upon the confessed judgments and on the same day, by a fraud upon the court, in a collusive action in the supreme court of New York to dissolve the partnership, they procured the appointment of a receiver of the partnership property, Morris Moses, who was nominated by and in collusion with them. Subsequently a receiver nominated by certain creditors, James T. Franklin, was associated with Mr. Moses by the same court.

Various creditors of the bankrupts immediately commenced actions of replevin to recover portions of the goods in the hands of the sheriff. Their claims were conflicting with each other and with those of the confessed judgment creditors, and in an action brought in the supreme court of New York by the receivers an order was made restraining the sale by the sheriff under the executions, directing a sale by receivers (Mr. Moses and Mr. Franklin being also appointed such receivers in that action), and that the latter should hold the proceeds of the sale subject to the claims of all parties, such claims to be determined in that action. Pursuant to this order, the goods were sold, and the receivers so appointed now hold the proceeds thereof. This order was made November 23, 1896. The action is still pending, undetermined.

On the 22nd day of October, 1896, and the 29th day of October, 1896, Metcalf Brothers & Co. procured judgments in the supreme court of the State of New York against the Lessers for $930.21 and $2,547.80 respectively, upon which executions were issued and returned unsatisfied.

On the 17th day of December, 1896, Metcalf Brothers & Co. commenced a judgment creditors' action

in the supreme court of the State of New York, which came to trial on the 17th day of December, 1897, and as a result of which the transfers to which reference has been made and the proceedings for the appointment of the receivers were adjudged fraudulent and void as to them. The court, however, set aside the transfers of the co-partnership property, not only in favor of Metcalf Brothers & Co., but also in favor of the receivers. It set aside the transfer of the real estate in favor of Metcalf Brothers & Co. alone. Judgment was entered on this decision April 6, 1898.

This judgment determined that the proceeds of the sale of the tangible property then in the hands of the receivers and the outstanding accounts or their proceeds in the hands of the transferees (to be accounted for under the judgment of the receivers) were to be administered by the receivers for the benefit of all the creditors of the co-partnership equally, including Metcalf Brothers & Co., while the real estate transferred became subject to the lien of the judgments of Metcalf Brothers & Co. on October 22nd and 29th, 1896.

All parties except the receivers appealed from this judgment to the appellate division of the supreme court of New York; that court affirmed the judgment of the trial court as to the fraud, but reversed it in so far as it granted relief in favor of the receivers. It directed the payment by the receivers to Metcalf Brothers & Co. of the amount of their judgments out of the money in the receivers' hands and, since Metcalf Brothers & Co. were to be so paid, it reversed the judgment in their favor against Adler, one of the transferees of the accounts. Upon the ground that there was no proof of fraud, it also reversed it against the transferee of the real estate.

This decision was embodied in an instrument made the 30th day of December, 1898, entitled an "order," but which, after reciting the necessary facts, "ordered and adjudged" that the judgment of the trial term be modified as stated, and also "ordered and adjudged" that the transfers in question, except the transfer of the real estate, were fraudulent and void as to Metcalf Brothers & Co.; that the receivers be, and they were

thereby, directed to pay to Metcalf Brothers & Co. the amount of their judgments, with costs, and that final judgment should be entered in accordance therewith. This instrument was filed in the office of the clerk of the appellate division of the supreme court of New York, and was the only paper signed by that court or kept in its records. A certified copy of it was transmitted to the clerk of the supreme court, upon which, after the costs had been taxed, a final judgment was entered by the latter clerk on the 31st day of January, 1899, following in all essential respects its verbiage. The delay in the entry of final judgment was caused by various motions before the appellate division for reargument.

On the 12th day of May, 1899, Lesser Brothers filed in the district court of the United States for the southern district of New York a petition to be adjudged bankrupts, and they were adjudicated bankrupts on that day. Subsequently, and on the 7th day of June, 1899, Benjamin Barker, Esq., was appointed their trustee in bankruptcy.

From the judgment of the appellate division in the action brought by Metcalf Brothers & Co. all parties except Lilianthal, the transferee of the real estate, appealed to the court of appeals of the State of New York. That court affirmed the judgment of the appellate division in favor of Metcalf Brothers & Co., and also restored to them the rights awarded them by the judgment of the trial court, of which they had been deprived by the appellate division. The final result of the litigation was that the transfers in question were declared fraudulent and set aside in favor of Metcalf Brothers & Co. only; that as to all other persons they were (until impeached in a proper action) valid; that the receivers were directed to pay out of the funds in their hands to Metcalf Brothers & Co. the amount of their judgments, and that those creditors could also proceed for the collection of their judgments, if necessary, against the transferees of the accounts and real estate.

The decision of the court of appeals was made on the 6th of February, 1900. The remittitur from that court to the supreme court was received and filed on the 12th day of March, 1900. On the 8th day of March, 1900, the bankrupts' trustee, upon affidavits of himself and his counsel, procured from the district court of the United States for the southern district of New York an order entitled in the bankruptcy proceeding requiring Metcalf Brothers & Co. to show cause on the 13th day of March, 1900, why a writ of injunction should not issue enjoining them from taking any further proceedings under any judgment in their creditors' action and so enjoining them in the interim. This order provided for its service upon the members of the firm of Metcalf Brothers & Co., but it was not in fact served upon anyone but their attorneys in their judgment creditors' action. Metcalf Brothers & Co. appeared specially upon the return day of the order to show cause and filed a written objection that the district court was without jurisdiction, power or authority over them in the premises; that no action or other proceeding was pending or had ever been begun against them in any way relating to the subject matter of the proposed injunction; that they had not appeared in or been made a party to any proceeding founded upon the petition of Lesser Brothers to be adjudged bankrupts, and that they had not been brought into court on any process or been given any notice of the order to show cause except that their attorneys in their creditors' action had received a copy thereof, and especially that no statute conferred upon the district court jurisdiction, power, or authority to issue any writ of injunction in the premises.

Their objection was overruled, and after an argument on the merits of the application the injunction was continued.

Questions Certified.

1. Had the district court of the United States for the southern district of New York jurisdiction to make the injunction order in question?

2. If said court had jurisdiction to restrain Metcalf Brothers & Co. from receiving the fund in question, could such jurisdiction be exercised by summary proceedings?

3. Did Metcalf Brothers & Co. by the commencement of their creditors' action acquire a lien on the property of the bankrupts superior to the title of the trustee thereto?

4. If the lien acquired by the commencement of the creditors' action was inchoate merely, was it perfected by a judgment obtained more than four months prior to the filing of the petition of the Lessers in bankruptcy within the meaning of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?

5. If the lien acquired by the commencement of the creditors' action was inchoate merely, was the judgment in the creditors' action, whenever obtained, one which is avoided by any of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?

Assignment of Error by the District Court.

The opinion rendered by the District Court upon enjoining the petitioners is reported in 100 Fed. Rep., 433.

The injunction order was made upon grounds, as appears from the opinion of the District Court, which are stated briefly as follows:

(1) That the Court had jurisdiction (p. 438); (2) that, although the petitioners acquired an equitable lien on the property fraudulently transferred by the commencement of their creditors' action, yet this lien was inchoate and must stand or fall with the judgment in that action (pp. 436, 437); (3), that the petitioners' only judgment perfecting their lien was the judgment

of the Appellate Division which was entered within four months of the adjudication in bankruptcy and therefore void (p. 437); and (4) that the petitioners' judgment inured to the benefit of the trustee (p. 436).

In all these respects, we contend, the court erred. We may add that the position of the court is not wholly consistent, in that it recognizes the petitioners' judgment for the purpose of establishing the lien and vesting title in the trustee (p. 438) but denies it any validity for the purpose of perfecting their rights as lienors.

Argument.

There are three important questions involved:

1. That of jurisdiction.

2. The nature of the lien acquired by the petitioners by the commencement of their judgment creditors' action.

3. Whether the petitioners' judgment against the bankrupts is brought within the terms of §67 of the Bankruptcy Act.

I.

The question of jurisdiction.

This question is to be considered under three heads:

a. Does the Bankruptcy Act confer any jurisdiction on the District Court such as was exercised in this instance?

b. If so, are not the petitioners still entitled, of right, to be brought into court in a plenary suit?

c. Even granting a general jurisdiction in the District Court, had it any such jurisdiction where the litigation is already in the State Court?

A.—We contend that the District Court was wholly without jurisdiction.

On this point, we submit, the decision is in conflict with the cases of

Bardes v. *First National Bank of Hawarden*, 178 U. S., 524, and
Louisville Trust Company v. *Comingor*, 184 U. S.

It is not open to controversy that the claim of Metcalf Brothers & Co., is one *adverse to the bankrupt*. Three years of litigation in the State Court have settled that fact. The claim is, also, of course, adverse to the bankrupt's trustee, who can claim only the bankrupt's property. The petitioners' position is much stronger than that of the claimants in the *Bardes* and *Comingor* suits; for there the claim was made through the bankrupt, and was unadjudicated, while here it is based upon a judgment of the State Court adjudicating the petitioners' rights *against the bankrupts*, and also against the persons to whom they had transferred their property.

In the *Comingor* case, this Court says of the defendant:

"He thus asserted a claim to each of these sums *adversely to the bankrupt*, and as outstanding when the petition in bankruptcy was filed, and these claims were in fact passed upon by the referee and the district judge as being adverse. This brought the controversy within the ruling in *Bardes* v. *First Nat. Bank*, 178 U. S., 524, and the questions attempted to be litigated before the referee and in the district court as to the allowance of the two amounts could only be raised in the district court by consent, and *then only by plenary suit*. If the jurisdiction of the district

court was not consented to, then *the state court, under the circumstances of this case, was the proper forum*, and the matters in dispute were to be disposed of there."

The petitioners did not consent to the jurisdiction of the District Court, but appeared specially only and protested against its exercise. (Record, p. 4). They are brought precisely within the decision in the *Comingor* case. They are not parties to the bankruptcy proceedings and were never brought into court by the service of any process. The action of the District Court was not a "bankruptcy proceeding" within any definition of the Bankruptcy Act. It was much more summary and drastic than the result of an action at law or a suit in equity because it enjoins and concludes the petitioners absolutely from litigating in the State Courts the rights claimed by the trustee—to which courts the trustee is nevertheless sent by the District Court to procure the property claimed by the petitioners. This has been done, too, without giving the petitioners opportunity to litigate their rights in the plenary action to which, we submit, they are entitled.

B.—The petitioners are entitled to have their rights adjudged in a plenary action to which all persons interested are made parties.

The decisions of this Court on this point also are, we submit, conclusive. The doctrine is re-asserted in the *Bardes* case and in the *Comingor case*. In the *Bardes* case the Court says (p. 532):

"It was also repeatedly held by this court that the "right of an assignee in bankruptcy *to assert a title in* "*property* transferred by the bankrupt before the bank- "ruptcy to a third person, who now claimed it adversely "to the assignee, *could only be enforced by a plenary* "*suit*, at law or in equity, under the second section of the "act of 1867; and *not by summary proceedings* "under the first section thereof, notwithstanding the "declaration in that section that the jurisdiction in

" bankruptcy should extend ' to the collection of all the
" ' assets of the bankrupt,' and ' to all acts, matters and
" ' things to be done under and in virtue of the bank-
" ' ruptcy,' until the close of the proceedings in bank-
" ruptcy. Smith *v.* Mason, (1871) 14 Wall., 419;
" Marshall *v.* Knox, (1872) 16 Wall., 551, 557; Eyster
" *v.* Gaff, (1875) 91 U. S., 521, 525."

The language of the Act of 1898 (§2, Subdv. 7) is no stronger in this respect than the Act of 1867.

Smith v. *Mason*, 14 Wall., 419, holds that "*Strangers*
" *to the proceedings in bankruptcy*, not served with
" process, and who have not voluntarily appeared
" and become parties to such a litigation, *cannot*
" *be compelled to come into court under a petition for*
" *a rule to show cause*, as in this case; nor is the exer-
" cise of such jurisdiction necessary, as the third clause
" of the second section of the Bankruptcy Act affords the
" assignee a convenient, constitutional, and sufficient
" remedy to contest every adverse claim made by any
" person to any property or rights of property trans-
" ferable to, or vested in, such assignee," and that a contest for a fund between a transferee and an assignee in bankruptcy cannot be determined in a summary way by the District Court sitting in bankruptcy, without due process of law, but only by a suit in equity or an action at law.

Marshall v. *Knox*, 16 Wall., 551, Bradley J.:
" *Neither the sheriff nor the lessor was a party to the*
" *proceedings in bankruptcy.* No process had been
" served upon them to make them such. *They were not*
" *before the court; and the court had no control or*
" *jurisdiction over them.* Under these circumstances
" the assignees applied for and obtained from the Dis-
" trict Court, a rule on the lessor and sheriff to deliver
" the goods to them. Had the court authority to make
" such a rule? Could such a rule be characterized as
" due process of law? * * * *If, therefore, ad-*
" *verse claims to property could be decided by the sum-*
" *mary action of the District Court, not only would*

"*the party claiming adversely to the assignee be de-*
"*prived of a trial by due process of law, but he would*
"*be without appeal.* An appeal was in fact denied in
"this case. We think it could not have been the
"intention of Congress thus to deprive parties
"claiming property, of which they were in possession,
"of the usual processes of the law in defence of their
"rights."

What the trustee has accomplished in this case is to have determined summarily, without the presence of necessary parties, *adverse claims* to property and has deprived the petitioners of a trial by due process of law to which this Court, in the cases cited, says they are entitled. What he has obtained is in effect a final judgment, as a necessary preliminary to which their rights, not only in relation to the trustee, but to a great number of parties not before the Court, including the officers of the State Court, were summarily and finally tried on affidavits? Surely there is no authority in the Bankruptcy Act or elsewhere for such an arbitrary exercise of judicial power.

C.—Irrespective of the statutory want of jurisdiction of the District Court and of the petitioners' right to be sued in a plenary suit, the Court, we submit, had no jurisdiction because the litigation is in and under the control of the State Court.

On this point also we submit that the decision is in conflict with the well-established rule as laid down by this Court.

The leading case on this point is

Peck v. *Jenness*, 7 How., 612.

It, and like cases in this Court and elsewhere, are, we submit, conclusive. It is cited with approval in the *Bardes* case (p. 534) and in *White* v. *Schloerb*, 178 U. S., 542 decided at the same time. Its doctrine is

repeated in *Louisville Trust Co.* v. *Comingor*, already cited.

Peck v. *Jenness* involved the discussion of a proceeding very like the one here instituted. In that case, as here, the District Court had decided that the lien of an attachment issued out of a State Court was defeasible and invalid as against an assignee in bankruptcy. But this Court made short work of its pretensions. It says of a plea of that fact: "It does not pretend to show how "the proceedings in the Court of Common Pleas had "been removed to the District Court, or how its judg- "ment on the cause pending before it could be thus "anticipated; nor that the District Court had found "any means of enforcing its decree by compelling the "sheriff to deliver the property attached to the as- "signee, and thus, in effect, destroy the lien." It proceeds to say that the jurisdiction of the State Court had attached more than a month (in this case it is over two years) before the passage of the act of bankruptcy and that the District Court had no supervisory power over the State Court. "It is a doctrine of law too long es- "tablished to require a citation of authorities, that, "*where a court has jurisdiction, it has a right to de-* "*cide every question which occurs in the cause*, and "whether its decision be correct or otherwise, its judg- "ment, till reversed, is regarded as binding in every "other court; and that, *where the jurisdiction* of a "court, and the right of a plaintiff to prosecute his "suit in it, *have once attached, that right cannot be* "*arrested or taken away by proceedings in another* "*court. These rules have their foundation, not merely* "*in comity, but on necessity. For if one may enjoin,* "*the other may retort by injunction, and thus the* "*parties be without remedy; being liable to a process* "*for contempt in one, if they dare to proceed in the* "*other.* * * * The fact, therefore, that an in- "junction issues only to the parties before the court, "and not to the court, is no evasion of the difficulties "that are the necessary result of an attempt to exercise

"that power over a party who is a litigant in another "and independent forum."

Rouse v. *Letcher*, 156 U. S., 47: "It is well settled "that where property is in the actual possession of a "court, this draws to it the right to decide upon con- "flicting claims to its ultimate possession and control."

Taylor v. *Caryl*, 20 How., 283; *Freeman* v. *Howe*, 24 How., 450, and *Covell* v. *Heyman*, 111 U. S., 176, are all cases laying down very forcibly the same doctrine.

The Courts maintained this position on the specific point here involved under the Act of 1841.

Clarke v. *Rist*, 3 McLean, 494.
Ex parte Waddell, 1 N. Y. Leg. Obs., 53; 28 Fed. Cas., 1312.

And under the Act of 1867.

Johnson v. *Bishop*, Woolworth, 324. Fed. Cas., 7,373.
Goodrich v. *Remington*, 6 Blatch., 515.
In re Clark, 3 N. B. R., 491, 524; Fed. Cas., 2,798.
Alden v. *Boston H. & E. R. Co.*, 5 N. B. R., 230; Fed. Cas., 152.
Sedgwick v. *Menck*, 1 N. B. R., 675.

Similar decisions have been made under the Act of 1898.

In re Gerdes, 102 Fed. R., 318.
In re Kavanaugh, 99 Fed. R., 928.
In re Russell, 101 Fed. Rep., 248.
Frazier v. *Southern Loan & Trust Co.*, 99 Fed. Rep., 707.
Pickens v. *Dent*, 106 Fed. Rep., 653.

In the last named cases the precise question here involved was decided by the Circuit Court of Appeals for the 4th Circuit. In the *Frazier* case there was, as here,

a creditors' action. It was commenced in 1894. Judgment was entered in favor of the plaintiffs in *June*, 1899. The bankrupt had been adjudicated such in *April*, 1899. The bankrupt's trustee procured from the District Court, upon petition, an order restraining a sale under the decree in the creditors' action and the District Court subsequently undertook to sell the property itself through the trustee. The Court after reviewing the authorities concludes:

"For the reasons stated, we hold *that, the state court* "*having acquired jurisdiction* of the subject matter and "taken possession of the property more than four "months before the adjudication in bankruptcy, it *must* "*be allowed to remain in control of the same, and to* "*dispose of it under its own decrees.*"

In the *Pickens* case, the creditors' action had been commenced in 1889 and was still pending when the fraudulent transferee was adjudicated a bankrupt. The Court followed the *Frazier* case, saying: "Con- "sidering the peculiar character of our government, and "keeping in view the forbearance which courts of co- "ordinate jurisdiction exercise towards each other, it "follows that the court which first obtains rightful "jurisdiction over the subject matter of a controversy "must by all other courts be permitted to proceed "therein to final judgment. The federal courts will "not interfere with the administration of affairs law- "fully in the custody and jurisdiction of a state court, "nor will they permit the courts of the states to inter- "fere concerning litigation rightfully submitted to the "decision of the courts of the United States. The "bankrupt act of 1898 does not in the least modify this "rule, but with unusual carefulness guards it in all of its "detail, provided the suit pending in the state court "*was instituted* more than four months before the dis- "trict court of the United States had adjudicated the "bankruptcy of the party entitled to or interested in "the subject matter of such controversy."

II.

The nature of the petitioners' lien.

By the commencement of their judgment creditors' suit in December, 1896, the petitioners acquired a lien upon all of the equitable assets of the judgment debtors. They had previously acquired a judgment against their debtors and the commencement of this suit was for the purpose of executing it. Their suit was "an equitable execution;" by commencing it they made "an equitable levy," and acquired "a specific lien" upon the property upon which that levy was made. Their claim against their debtors had already been adjudged valid and the only question involved in the creditors' suit was whether the property sought to be used for the satisfaction of their judgment is that of the judgment debtor. This lien is an absolute charge upon the property transferred, and any title which the trustee may acquire to the property by virtue of proceedings to avoid the transfers by the bankrupts is subject to it.

The District Court concedes that by the commencement of their creditors' suit the petitioners acquired an equitable lien upon the property transferred by the bankrupts. No question is raised that the assets affected were not equitable assets. No such question can properly be raised, for all the merchandise and tangible personal property originally subject to levy and sale under an execution has long since been converted into equitable assets by sale under an order of the Supreme Court of New York and is under the jurisdiction of that Court. (*Lawrence* v. *Bank of the Republic*, 35 N. Y., 320; *Thurber* v. *Blanck*, 50 N. Y., 80; *Briem* v. *M. N. Bank*, 127 N. Y., 508.) But the Court maintains that the lien is merely an inchoate or contingent one and that, if a judgment which awards the judgment creditors the property upon which they have levied is obtained within four months of the filing of a petition in bankruptcy by the judgment

debtors, both the judgment and the lien theretofore acquired by the commencement of the suit are avoided by the provisions of the bankruptcy act.

In this it opposes itself to a long line of consistent authorities, and every other Court, federal or state, which has considered the question since its decision has refused to follow it.

I.—*The lien is acquired by the commencement of the suit and is an absolute charge on the property transferred by the bankrupts.*

Miller v. *Sherry*, 2 Wall., 237: "The *filing of a* "*creditor's bill* and the service of process *creates a* "*lien* in equity upon the effects of the judgment debtor. "*It has been aptly termed 'an equitable levy.'*"

The case of *Storm* v. *Waddell*, 2 Sand. Ch. 494, which is cited as an authority for the statement in the text, contains a long and very learned exposition of the law on the points involved in this appeal. It is a precise authority and is directly opposed to the position of the District Court. It will be considered hereafter.

In *Freedman's Savings & Trust Co.* v. *Earle*, 110 U. S., 710, 716, the Court, speaking of the complainant in a creditor's suit, says:

"*As his lien begins with the filing of the bill*, it is "subject to all existing encumbrances, *but is superior* "*to all of subsequent date.* * * * *It is the execu-* "*tion first begun to be executed, unless otherwise regu-* "*lated by statute, which is entitled to priority. The* "*filing of the bill, in cases of equitable execution, is* "*the beginning of executing it.*" (p. 719): "In every "such case the equity of redemption could only be "applied after sale by the executor or administrator in "the ordinary course of administration, subject to what-"ever liens may have been imposed upon it in the life-"time of the mortgagor, and among them, as we have "seen, is that of an execution creditor who has filed his

" bill to subject it to the payment of his judgment. So, in " other cases where the rule of equality in distribution, " as to equitable assets, applies, as in cases of assignments " by the debtor himself for the payment of debts general- " ly, *and in cases of bankruptcy and insolvency*, except " as otherwise expressly provided by statute, the estate " passes, subject to existing liens, *including that of an* " *execution creditor who had previously filed a bill to* " *subject the equitable interest of the debtor, and his* " *priority is respected and preserved.*"

The Federal Courts have announced the same doctrine under the former bankrupt acts.

Act of 1841.

Ex parte General Assignee, 1 N. Y. Leg. Obs., 131; Fed. Cas., 5,305, D. C., N. D. N. Y., Conkling, D. J., (1842): "No one doubts, that at some stage of it, the " prosecuting creditor acquires an exclusive right to sat- " isfaction out of the property of the defendant when " it is not bound by any prior lien. This right can be " nothing less than a lien valid by the laws of the state; " and the only question is at what stage of the proceed- " ings does it attach. And upon this point the de- " cisions of the courts appear to me *to leave no room for* " *doubt*. It has been repeatedly decided that *such lien* " *is acquired at the commencement of the suit*; that is " to say, by the filing of the bill and the service of sub- " pœna. It is sometimes called a 'preference,' some- " times a 'priority,' sometimes simply a 'lien,' and " sometimes a 'specific lien:' and it has uniformly been " held *to prevail over any subsequent voluntary assign-* " *ment* by the debtor; and, what is still more perti- " nent, and, as it seems to me, ought of itself " to be nearly decisive of the question in this " court, over a subsequent assignment under the " insolvent acts. * * My conclusion then is, " that *by the institution and diligent prosecution, of* " *a suit* by a creditor's bill, without collusion with the " defendant, and in good faith, *the complainant acquires*

"*a lien on the property* of the defendant *which is not* "*divested by a decree of bankruptcy* entered upon a "petition filed by or against the defendant, subsequently "to the full commencement of the suit. * * * "If the complainant, after filing his bill and obtain- "ing an injunction fails to prosecute his suit with "proper diligence and to obtain the appointment of a "receiver, the case of Osborn *v.* Heyer, 2 Paige, 342, "is an authority for saying that his injunction will be "dissolved and his lien superseded."

The application in this case was by the assignee in bankruptcy to restrain creditors of bankrupts from further prosecution of a creditor's bill in the Court of Chancery of New York, which had not proceeded the judgment. The application was denied.

Clark, Assignee, v. Rist, 3 McLean, 494; Cir. Ct., D. Ohio, 1844. Upon a bill by assignment in bankruptcy the Court refused to issue an injunction to restrain proceedings in State Court. There had been *no judgment* in the creditors' suit before the adjudication in bankruptcy.

"From the language here used, it is unde- "niable that the lien of the judgment creditor is "coeval with the date of the service of the subpœna "in chancery. This, it is understood, is in accordance "with the uniform construction of the law by the courts "of Ohio, and the practice of those courts under it. The "statute proceeds on the principle, that *by the judgment* "*at law* the creditor acquires an inchoate right to the "equitable interest of the judgment debtor; which, how- "ever, can only be perfected and made available, by a "decree of sale by a court of chancery. But it is "within the evident design of the statute, that *from the* "*time of the service of the process in the chancery pro-* "*ceeding, legal validity and force are given to this* "*previously existing but imperfect right. Under a* "*similar statute in New York, the same practice and* "*the same principle of construction have obtained in the* "*courts of that state.* * * * The lien of "the judgment creditors, though not perfect

"on the rendition of the judgments, *became "so upon the service of the process in chan- "cery*, which was prior to the filing of the application "in bankruptcy. These creditors then occupy the "same position, and are entitled to the same rights, as "if the bankrupt had possessed the legal estate, instead "of an equitable interest, in the lands mentioned in the "bill. Their liens are saved under the bankrupt law; "and the state court having rightfully taken juris- "diction of the proceedings, designed to perfect those "liens, may retain it, till the object sought for is con- "summated, in accordance with the statute. * * * "By these judgments, and the subsequent pro- "ceedings thereon in the state court, the de- "fendants in the bill acquired a *bona fide lien*, prior to "the filing of the petition in bankruptcy. The equitable "interest of the bankrupt, in the property in question, "did not therefore pass to, and rest in, his assignee. " * * * When a state tribunal has rightfully taken ju- "risdiction of a case, though having some connection with "an estate in bankruptcy, it affords no sufficient reason "for its withdrawal from that jurisdiction, that a fed- "eral court might have taken cognisance of it. And "it is proper, *that the courts of the nation should cau- "tiously abstain from the unnecessary exertion of "powers, which may bring them into conflict with the "state courts*. Nothing can tend to the more serious "disturbance of the harmonious action of the state and "federal authorities, than these conflicts. And as far "as practicable, consistently with the operation of the "just powers of each, they are to be studiously "avoided."

Act of 1867.

Johnson, Assignee, v. *Rogers*, 15 N. B. R., 1; Dist. Ct. N. Y., 1876. The action was by an assignee in bankruptcy to set aside a general assignment as fraudulent. Judgment creditors were parties.

An action was pending by certain creditors at the time the petition of bankruptcy was filed to set aside

the assignment but it had not proceeded to trial or judgment.

Wallace, D. J.: "The assignee in bankruptcy, "though he represents all the creditors of the bankrupts, "acquires only the title of the bankrupts, except as he "is also invested with the right of creditors to assail "fraudulent transfers, and with title to property con- "veyed by the bankrupts contrary to the provisions of "the bankrupt act. *With these exceptions his title is* "*subject to all liens existing upon the property, legal* "*or equitable, at the time of the commencement of the* "*proceedings in bankruptcy.*" * * * It is "urged for these defendants that, by the filing of "their creditors' bill, they acquired an equitable lien "upon all the assets in the hands of the original as- "signees, which lien is not defeated by the proceedings "in bankruptcy. If such a lien was acquired, *it is not* "*defeated by the bankruptcy proceedings, but is to be* "*recognized and enforced by this court:* the more dif- "ficult inquiry is, as to the nature and extent of the "lien. Where such an action is brought to reach choses "in action, or property not subject to sale upon execu- "tion, according to the weight of authority *the lien is* "*acquired by the mere commencement of the action.*"

The opinion cites, among other authorities, *Storm* v. *Waddell*, 2 Sandf., Ch. 494 (to which reference has already been made as directly opposed to the position of the District Court), and holds that the plaintiffs in the judgment creditors' action have an equitable lien on the interest of the bankrupt in property not the subject of levy, which came to the hands of the complainant, to the amount of their judgment together with costs in State Court.

Kimberling v. *Hartly*, 1 Fed. Rep., 571, Cir. Ct. E. D., Kansas, 1880. Action of ejectment by bankrupt's vendee to recover property sold under judgment creditor's action in State Court.

Caldwell, J.: "*The law is well settled that the filing of such a creditor's bill,* and the service of process in the action, *create a lien* in equity upon the lands described in the bill, and entitle the plaintiff to priority over other creditors. (Storm *v.* Waddell, 2 Sand. Ch., 494; Tilford *v.* Burnham, 7 Dana, 110; Maffit *v.* Ingham, *id.*, 495; Hartshorn *v.* Eames, 31 Me., 93; Newdigate *v.* Jacobs, 9 Dana, 18; McDurmott *v.* Strong, 4 John. Ch., 687; Spader *v.* Davis, 5 John. Ch., 280; Carr *v.* Farrington, 63 N. C., 560; Fetter *v.* Cirode, 4 B. Mon., 482; Day *v.* Washburne, 24 How., 352; Clark *v.* Rist, 3 McLean, 494.) 'It has been aptly termed an equitable levy' (Miller *v.* Sherry, 2 Wall., 249). And *this lien is not displaced by the subsequent bankruptcy of the judgment debtor* but is protected by the bankrupt act. Clark *v.* Rist, 3 McLean, 494; Sedgwick *v.* Menck, 6 Blatch., 156; Parker *v.* Muggridge, 2 Story, 334; Storm *v.* Waddell, *supra;* Carr *v.* Farrington, *supra;* Fetter *v.* Cirode, *supra;* Newdigate *v.* Jacobs, *supra*; McDurmott *v.* Strong, *supra;* Goddard *v.* Weaver, 1 Wood., 260; Yeatman *v.* Savings Inst., 95 U. S., 764; Stewart *v.* Platt, U. S. Sup. Ct., 1879. * * * But in any suit brought by the assignee for this purpose the creditors' liens on the property, whether acquired by creditors' bill or otherwise, would not be displaced or annulled; and, if the suit was successful, the assignee would have to distribute the fund according to priority of liens and right between the creditors. And if the property did not exceed in value the amount of Hartly's lien upon it, and other creditors would derive no benefit from the suit, *the assignee acted wisely in not intervening and allowing the lien creditor and the bankrupt to settle the controversy between themselves in the state court* without expense to the estate. * * * The judgment creditor *filed his bill*, had a subpœna served, and *thereby acquired a lien* before the commencement of proceedings in bankruptcy. He did not prove his debt against the estate of the bankrupt, or *in any matter voluntarily submit himself to the jurisdiction of the bankrupt court.* * * *

"*The discharge of the bankrupt pending the suit did* " *not discharge or impair the lien acquired by the com-* " *mencement of the suit.*"

Sedgwick v. *Menck*, 1 N. B. R., 675; Cir. Ct., S. D. N. Y., 1868.

Nelson, J.: " The *filing of these bills*, according to " the law of New York, *gave a lien* upon the assets of " the debtor in behalf of the judgment creditors; and " the receiver representing their interests has, it seems, " been diligently engaged in endeavoring to reduce them " to possession and apply them to the payment of the " judgments. *It is difficult to see what right exists in* " *the assignee in bankruptcy to this property thus de-* " *voted by the law* to the payment of the debts of these " judgment creditors some ten years before any right " attached in bankruptcy. * * * *The question of* " *the right to this property is in the state court where* " *it belongs, and the decision of that court will be con-* " *clusive upon the right.* If in affirmance of the " judgment of the court below, the property will be ap- " plied to the satisfaction of the judgments on the cred- " itors' bills; if in favor of the validity of the assign- " ment, it will take the direction given under the trusts " created in the assignment. *The right to this property* " *attached long before the assignment in bankruptcy ap-* " *peared*, and before even the passage of this bankrupt " law."

Act of 1898.

The precise question— as to the lien of a creditors' bill —does not seem to have been passed upon by the Federal Courts in cases arising under the act of 1898. An analogous question—as to the lien of an attachment—has been so passed upon and in every case but one, the courts have overruled this case. Reference will be made to these authorities hereafter. But various State courts have passed upon the question of the superior lien of a creditor's bill and have uniformly followed the rule as it has been heretofore established.

Doyle v. *Heath*, 47 Atlantic Rep., 213; 4 Am. Bank. Rep., 705; Supreme Court of Rhode Island, Sept. 22, 1900.

On *Dec. 15, 1899*, the complainant commenced a judgment creditors' action. On *May 15, 1900*, judgment was entered in his favor. On *May 25, 1900*, the defendant filed his petition in bankruptcy. The trustee asked for an injunction. The Court refused to follow the reasoning of the District Court in this case, although it was cognizant of and cited it. It follows *Miller* v. *Sherry* in saying that *the lien dates from the filing of the bill*. It approves and quotes from *Taylor* v. *Taylor*, 59 N. J. Eq., 86, to the same effect. And it *holds* "that the decree of May 15, 1900, though entered with-"in four months of the filing of the petition in bank-"ruptcy by Heath, was not avoided by the adjudica-"tion in bankruptcy, inasmuch *as such decree did not* "*then create a lien* in favor of complainant, but deter-"mined that Doyle was entitled to an equitable lien on "the stock at the time of the filing of his bill."

Taylor v. *Taylor*, 59 N. J. Eq., 86, Feb., 1900: "Now, the complainant in this case had at the date of "the institution of the proceedings in bankruptcy a lien "upon the equitable property of the bankrupt—*a lien* "*which arose by the commencement of this suit* more "than four months before the bankrupt proceedings "were begun. As a general rule an equitable lien is "acquired by the filing of a creditor's bill or a bill in "the nature of a creditor's bill upon the choses in ac-"tion and equitable assets of the judgment debtor. "(Sm. Eq. Rem. Cred., p. 234, par. 220.) The ex-"istence of this lien was elaborately considered by Vice-"Chancellor Sandford in *Storm* v. *Waddell*, 2 Sandf. "Ch., 494. An assignee in bankruptcy applied to the "court of chancery for money which had been dis-"covered by means of creditors' bills against several "bankrupt judgment creditors. The statute under "which the bill was filed was similar to ours. It was "held that the right acquired by the creditor was a lien "upon the things in action which the creditor had at

" the time of the commencement of the suit. The same " was held in *Fetter & Co. v. Ciroda, et al.*, 4 B. Mon., " 482, where suit was brought by judgment creditors to " set aside fraudulent conveyances, and in *Watkins v. " Pinkney*, 3 Edw. Ch., 533, upon motion to attach " defendant in creditor suit for discovery for not as- " signing his property to the receiver appointed in the " suit, and who set up that since the filing of the cred- " itor's bill he had made application for the benefit of " the bankrupt law. To the same purport are the fol- " lowing cases: *Sedgwick v. Menck*, 6 Blatch., 156; " *Johnson v. Rogers*, 15 Bankr. Reg., 1; *In re Hinds*, " 3 Bankr. Reg., 351; *Stewart v. Isador*, 1 Bankr. Reg., " 485; *Carr v. Fearington*, 63 N. C., 560;" citing also *Bank v. Shuler*, 153 N. Y., 163; *Corning v. White*, 2 Paige, 567; *McDermutt v. Strong*, 4 Johns. Ch., 687; *Miller v. Sherry*, 69 U. S., 237. " As against " any one but a *bona fide* purchaser for value, *it* " *is settled by the overwhelming weight of author-* " *ity* that *upon filing a bill* and issuing a subpœna " *the judgment creditor acquires a lien* which becomes " specific when property of the debtor is discovered. *It* " *is entirely settled that a trustee* or assignee *in bank-* " *ruptcy takes the property of the bankrupt subject to* " *all equitable liens.*"

Iselin v. Goldstein, 35 Misc. Rep., 189 N. Y. (July, 1901): " The *subsequent proceedings in bankruptcy* " *cannot affect the equitable lien acquired by the com-* " *mencement of this action* long before the passage of " the bankrupt act. (Freedman's Saving & T. Com- " pany *v.* Earle, 110 U. S., 710, 716; Edmeston *v.* Lyde, " 1 Paige, 637; First National Bank *v.* Shuler, 153 " N. Y., 163.) The trustee in bankruptcy took only " the residuum which the debtor had on the third day " of June, 1899, this action having been begun long " before. The judgment debtor could not by proceed- " ings in bankruptcy further his scheme in any manner " by destroying the equitable lien obtained by his cred- " itors through the commencement of this action."

In *Bank* v. *Katz*, 1 Am. Bank. Rep., 19, and *Reid* v. *Cross*, 1 Am. Bank. Rep., 34, both considering the Act of 1898 in the Illinois Courts, it was *held* that the complainant had, by filing his bill to reach equitable assets acquired a lien superior to that of a trustee in bankruptcy and a stay was refused.

The State Courts.

The decisions of the Courts of New York—passing by those of any other State—have been uniformly in support of the petitioners' position. The leading case,

Storm v. *Waddell*, 2 Sandf. Ch., 494,

is precisely in point. In that case the Court refused to recognize the position taken by the District Court in *Ex parte Waddell*, 1 N. Y. Leg. Obs., 53, which was similar to that assumed in this case. The theory of the lien is elaborately discussed with a very extensive examination and citation of authorities and the case has been continually cited as authority in the Federal and State courts. So far as we are aware, its authority has never been seriously questioned.

In *Storm* v. *Waddell* no judgment had been entered prior to the bankruptcy proceedings. The reasoning rests entirely upon the situation as it was created by the commencement of the action. The Court say (p. 514), that "the right thus acquired by the creditor, is a "*charge* upon the things in action which the debtor had "at the commencement of the suit. *It is so far contin-* "*gent that it may possibly be defeated by the event of the* "*suit, although in this respect, the result is unmeasur-* "*ably more certain than in the suits by attachment* in "our sister states for the collection of ordinary debts. "And except on this contingency, *it is an absolute claim,* "*to be divested only on satisfaction of the debt and the* "*costs of the suit. It is just as certain and effectual* "*upon the effects discovered, as a mortgage or judg-* "*ment is upon the lands* thereby incumbered." And again (p. 532), "the commencement of the creditor's

" suit gave them an equitable lien upon the mortgage in " question, *which is as efficacious as the levy of an execu-* " *tion upon merchandise*" * * * (p. 505). "His " procuring a discharge in bankruptcy, would have no " effect whatever upon the right which Chester & Co. " acquired by their creditor's suit. It was *the property* " of the judgment debtor, not a new judgment against " him, which they sought by their bill. If they failed " in discovering property, their suit would fail. Thus " their proceeding was against the special effects, not " the person of Glover; and if available, would become " so by force of the discovery of such effects existing " at the time of filing their bill. On such effects, " *they obtained a vested right for payment, and a subse-* " *quent discharge of their debt by operation of law,* " *could not divest that right.*"

In *Lynch* v. *Johnson*, 48 N. Y., 27, the Court say that the commencement of the suit is to be regarded as " *an actual levy upon the equitable assets of the debtor*," and " this lien was rendered effectual by the final order " of the judge," and payment, or a liability to pay, in pursuance of that order is a defense to an action brought by any claimant acquiring a right subsequent to the commencement of the suit.

First Nat'l Bank v. *Shuler*, 153 N. Y., 163, 171: "*The* " *rule is well settled in this state* that the plaintiff in " a creditor's action acquires, *by the commencement of* " *the suit, a lien* upon the choses in action and equitable " assets of the debtor, which entitles him, in the suc- " cessful event of the action, to priority of payment " thereout in preference to other creditors, irrespective " of the priority of the respective judgments."

Roberts v. *Albany & West Stockbridge R. R. Co.*, 25 Barb., 662: " *As soon as the judgment creditor's suit* " *was instituted*, the plaintiff in that suit *obtained a* " *lien* on all the choses in action of Rutter. All the " title he had was subject to that lien; all that he could " pass was subject to it." * * * "*In contempla-*

" tion of law the title vested in the court when the ac-
" tion was commenced, and passed as from that date, to
" the receiver."

Jeffres Recr. v. *Cochrane*, 47 Barb., 557: "*By the* " *commencement of that action* the plaintiff acquired " *a lien* upon it. * * * If he succeeded, as he " afterwards did, the *lien created by the commencement* " *of the action would relate back to the time when the* " *action was commenced, and overreach the title of the* " *present defendant.*"

Utica Ins. Co. v. *Power*, 3 Paige, 365: "If that " suit was commenced, as I think it must have been, " before the assignment to the register, *the complain-* " *ants had acquired a specific lien* on this demand as " the property of Lynch; and they are entitled to hold it " for the satisfaction of their judgment, as against the " assignee, independent of the question of set-off."

Macy v. *Jordan*, 2 Denio, 570; Ct. of Errors, 1845. The lien upon a debtor's property and rights in action created by creditors' bill is not divested by a subsequent discharge in bankruptcy.

McDermutt v. *Strong*, 4 John Ch., 687, *Kent*, C.: "If they had a right to it as judgment creditors, by hav- " ing sued out execution at law, and having filed their " bill before any other judgment creditors had done " either, *that right could not be affected by a subsequent* " *assignment of that equity* by the debtor. And whether " that subsequent assignment was for the benefit of the " creditors in general, as it was in this case, or for the " benefit of some individual creditor, cannot alter the " application of the principle."

Smith v. ———, 4 Edw. Ch., 653. "A judgment " creditor, having acquired this equitable lien, *cannot* " *be divested of it by the debtor's subsequent proceed-* " *ings in bankruptcy.*"

Manderille v. *Campbell*, 45 App. Div., 512 (1899): "The effect of these cases is to compel a creditor who " wishes to take advantage of this statute to begin the " usual action in the nature of a creditor's action for the

" purpose of acquiring a lien upon property which he " seeks to reach. That *lien is created* only *by the com-* " *mencement of the action,* and if the subject of the " action is real estate, by the filing of a *lis pendens* and " the service of a complaint (*Edmoston* v. *McLoud,* " 16 N. Y., 543). When a creditor has taken that step, " he has made, as is said by Justice Swayne in *Miller* v. " *Sherry,* 2 Wall., 237, 249), 'an equitable levy' and " *he has obtained a specific lien* upon the property upon " which the equitable levy is made (*Storm* v. *Waddell,* " 2 Sandf., Ch. 494)."

There are a number of other decisions to the same effect, but to accumulate them would add little to the weight of those already cited.

II. *The lien is property and its existence does not depend upon a subsequent judgment.*

In *Haebler* v. *Myers,* 132 N. Y., 363, an action was brought by an attaching creditor whose attachment had been vacated and then restored, to recover moneys paid over by the Sheriff to a subsequent attachment creditor. The Court say: " The right of the plaintiffs " to recover could hardly be questioned if the money " had subsequently belonged to them when it was paid " by the sheriff to the defendants, but inasmuch as they " only had a lien upon it and had not then completed " their title, it is claimed that no action will lie for their " relief. In taking this position the defendants lose " sight of the fact *that a lien is property* in the broad " sense of that word, and although it has no physical ex- " istence *it exists by operation of law so effectively as to* " *have pecuniary value,* and to be capable of being " bought and sold. *They also ignore the proceedings* " *that were in progress to convert the lien into a title to* " *the fund.*"

The argument on the point that the lien is not contingent on a subsequent judgment can be stated no bet-

ter than by quoting the remarks of Mr. Chief Justice Parker in the very carefully considered case of

Kittredge v. *Warren*, 14 N. H., 509. He is there considering the status of an attachment lien under the Act of 1841, which, as the court in *Storm* v. *Waddell*, *supra*, say, is inferior to that of a creditor's bill. In the case of an attachment the creditors claim is not yet established. In the case of a creditor's suit, the fact of its establishment is the foundation of the suit. The argument is thus more than applicable here.

(p. 514) "Even if Congress, by the authority to pass "bankrupt laws, may be supposed to possess the power to "abrogate and annul vested rights of that character" (mortgages, pledges, particular liens and other securities held by creditors), "fairly acquired before any "act of bankruptcy, and before the passage of the "act itself; it would be somewhat remarkable, should "an attempt be made to carry such a power into execu- "tion, for the sake of an equal distribution of the "property among creditors who had not exercised equal "care and diligence; and it *would be most astonish- "ing if a provision should be made, by which such "rights might be defeated, at any time, at the pleas- "ure of the insolvent debtor, merely by filing his pe- "tition in bankruptcy.* * * * (p. 530) If this "lien or security were contingent or conditional, it is "not perceived why that should take it out of the ex- "press language of the proviso, which includes all "liens and securities, valid by the laws of the state. "The fact that it is dependent upon, and may be de- "feated by a contingency, does not make it any the "less a lien or security, so long as it exists. But the "existence of the lien or security is, in our view, in no "way contingent, conditional, or inchoate. *Its ex- "istence does not depend upon the judgment. It ex- "ists, in its full force, from the moment the attachment "is made:* as much so as a lien by judgment, upon "the rendition of the judgment, in the states where "that security is recognized. As we have already "seen, it fastens itself upon, and binds the property at

" once, giving priority of right. * * It is originated
" by the suit, and sustained by the suit, but is not part
" of it. *It can only be made available through a judg-*
" *ment, but the judgment neither changes its nature*
" *nor determines its validity; nor does it operate to per-*
" *fect the attachment.* The judgment establishes the
" existence of the demand upon which the attachment
" is predicated, and the security taken; whereas it was
" before only alleged, and presupposed, for the purpose
" of the security. *The security is not inchoate but*
" *it is conditional in the sense that liens by judgment*
" *are conditional.* It depends upon contingencies
" whether it will ever be made available to the creditor,
" and *so it is with liens by judgment, where there is*
" *a period when they cease to exist, if the judgment*
" *creditor has not proceeded to seize the property.* The
" continuance of a lien by attachment depends upon one
" contingency beyond liens by judgment, which is, that
" the plaintiff sustains his suit; but the fact that the
" law authorizes it to be fastened upon the property,
" *in invitum*, before the existence of the demand is
" admitted, or ascertained, and that it may be defeated
" and dissolved if it shall appear that the plaintiff has
" no claim, neither disproves its existence as a security
" before the demand is ascertained, nor shows that it
" did not confer vested rights from the moment it
" was taken. *A pledge to secure all demands which*
" *may be due from the pawner to the pawnee, is not*
" *the less a pledge, or the lien less perfect, because*
" *it may appear, upon an accounting, that nothing*
" *is in fact due. And an accounting, by which the*
" *pawner is found indebted in a certain sum, has*
" *no operation to perfect the pledge, although it as-*
" *certains the amount for which it stands as a secur-*
" *ity. Nor does the expiration of the day of payment,*
" *by which the pawnee obtains a right to sell the pledge*
" *and apply the proceeds in satisfaction of his demand,*
" *perfect the security, although it gives an absolute*
" *right to sell the pledge, which did not exist before.*
" Whether any lien will be available to the party en-
" titled to it, is usually a contingent matter, depend-

"ent upon his pursuing the regular steps to enforce it. "We cannot restrict the signification and meaning of "the term 'liens' or the term 'securities' by any argu- "ment drawn from the company in which they are "found. The maxim, *noscitur a sociis,* cannot be ap- "plied here with that purpose, for much of the argu- "ment which must be founded upon it would restrict "'liens' to such as arise from contract alone, resting "on possession. But this would prove quite too much, "it being clear and well settled that this term has here "a much broader meaning. And if these terms are "applicable to securities obtained by the creditor "through judicial or legal process, the course of argu- "ment that makes a subdivision in the securities of "that character, excluding those dependent upon "remedial *mesne* process, seems to find nothing in their "company upon which to base an exclusion of that "description. * * (p. 535.) *The attachment, or "lien, or security, is not constituted by the judgment; "its validity is not dependent upon the judgment; it is "not perfected by the judgment; nor is it enlarged or "changed by the judgment.* But it is, before judg- "ment a fixed and positive security for what may be "recovered, by means of which the plaintiff, at his "election, may hold the property, and obtain a prefer- "ence of satisfaction, provided he obtain a judgment, "and provided he proceed to levy his execution with- "in the limited time, and provided he complete the levy "according to law."

Similarly in *Haughton* v. *Eustis,* 5 Law Rep., 505, Fed. Cas., 6224, Judge Thompson says: "As to the "argument, that the rights or security upon property "attached, is contingent, and depends upon a course "of judicial proceeding to render it perfect and abso- "lute, it is sufficient to remark, that *it is no more "contingent than a lien by mortgage. That is in its "very nature defeasible. So, in fact, is the common "law lien. Defeasibility, contingency, necessarily en- "ter into the idea of a lien, for the moment the right "becomes absolute, it ceases to be a lien.* In case of

" mortgage, a course of judicial proceeding is as neces-
" sary to render absolute the right and title to the prop-
" erty, as in case of attachment."

III. *The argument of the District Court is based upon authorities which have been long since overruled.*

The position which the District Court seeks to maintain is not a new one. It arose and was earnestly considered under the Act of 1841 and was determined adversely to the assignee in bankruptcy.

Its opinion is based upon *Ex parte Foster*, 2 Story, 131. For each of the only other cases which tend to sustain the reasoning cited in the opinion (Smith v Gordon, 2 N. Y., Leg. Obs., 325, 22 Fed. Cas., 554, and *Ex parte* Waddell, 1 Leg. Obs., 53, are also dependent on it.

In that case, arising under the act of 1841, Mr. Justice Story, concluded that lien of an attachment was inchoate only and dependent upon a favorable judgment, *because the claim upon which it was based had not been made absolute*; that a discharge in bankruptcy would be a bar to the judgment, and he therefore enjoined the entry of a judgment. Subsequently in *Parker* v. *Muggridge*, 2 Story, 334, he distinguishes the *Foster* case. The *Parker* case was also a case of attachment lien, but the defendants had suffered default, the amount due had been admitted *and thus become fixed*. The defendants were estopped to say they had any defense and could not therefore plead a discharge in bankruptcy as a bar. *As the lien thus became absolute, the entry of judgment was permitted. The plaintiffs were adjudged to hold an equitable lien which the District Court sitting in bankruptcy should uphold.*

See also *Fiske* v. *Hunt*, 2 Story, 582.

Mr. Justice Story's reasoning is wholly based upon the fact that the plaintiff's claim is itself inchoate. If the claim is admitted or fixed, the lien is perfect. No question of possession is involved, for, as Mr. Justice Story points out, an equitable lien does not depend upon possession. In a creditor's suit, however, there is constructive possession.

The case of a creditor's bill, even upon Mr. Justice Story's reasoning, is quite different from that of an attachment lien. The creditor's claim is well established. A discharge in bankruptcy cannot be pleaded as a bar to a judgment. The bankrupt is not the real party. The real parties are those in possession of his property. The creditor's claim has been established by the judgment and execution upon which the bill is based. The only question in a creditor's suit is whether the property sought to be used for the satisfaction of the judment at law is that of the judgment debtor. The creditor is seeking merely to enforce the judgment and execution. As the Court say in *Freedman's Savings & Trust Co.* v. *Earle*, 110 U. S., 710, "It is the *execution* first begun to be executed which is entitled to priority. The filing of the bill, in cases *of equitable execution*, is the beginning of executing it." And the District Court for the Northern District of New York so held within five months after the decision of the *Foster* case.

Ex parte General Assignee, supra.

But Mr. Justice Story's action in the *Foster* case was not followed in other jurisdictions. The Courts almost unanimously recognized the validity of the attachment lien and allowed the entry of judgment on it subsequent to an adjudication of the debtor's bankruptcy. The execution of the judgment was, however, properly limited to the attached property.

Kittredge v. *Warren*, 14 N. H., 509.
Haughton v. *Eustis*, Fed. Cas., 6224.
Davenport* v. *Tilton, 10 Met., 320.
Franklin Bk.* v. *Bachelder, 23 Maine, 60.

Bates v. *Tappan*, 99 Mass., 376.
Bowman v. *Harding*, 56 Maine, 559.
Leighton v. *Kelsey*, 57 Maine, 85.
Stoddard v. *Locke*, 43 Vt., 574.
Daggett v. *Cook*, 37 Conn., 344.

Nearly all of these cases are cited with approval in *Doe* v. *Childress*, 21 Wall., 642, where it is said: "Ac- " cordingly, it has been held many times in the various " courts of the country, that *as to the class of attach-* " *ments not within the four months' limitation, the bank-* " *ruptcy proceedings do not work their dissolution*; that " the debtor's title passes to the assignee, subject to the " creditor's lien acquired by virtue of the attachment, " and that a judgment to be enforced against the prop- " erty attached, but not against the person of the debtor " or any other property, may be entered, although a dis- " charge has been granted, and is pleaded in bar of the " action. * * * *We think this is a sound exposi-* " *tion of the Statute.*"

This decision is quoted and approved in

Davis v. *Friedlander*, 104 U. S., 570.

Under the present bankrupt act, the Courts have also held an attachment lien valid where it was levied more than four months prior to the filing of a petition in bankruptcy, although judgment was not entered until within the prescribed period. They have with one exception (*In re* Johnson, 108 Fed. Rep., 373) refused to follow the reasoning of the District Court or the authority of its decision.

In re Blair, 108 Fed. Rep., 529, Dist. Ct. Mass. (1901), *Lowell, D. J.*: " Now, an attachment, in and of " itself, and without further proceedings, creates a lien " in Massachusetts. This has been decided by the " supreme court of the United States in *Peck* v. *Jen-* " *ness*, 7 How., 612. With this decision agrees that of " the supreme court of Massachusetts in *Davenport* v. " *Tilton*, 10 Mete., 320; and, if it be possible that these " concurrent decisions leave a doubt in the matter, that

"doubt is resolved by the present bankrupt act, *which* "*itself speaks of attachments as liens.* * * * * "Where, however, the lien is created by the attachment, "*the judgment and levy create no new or additional* "*lien, but only enforce a lien already existing.* * * * "The meaning of the subsection appears to be this: "Under some circumstances, all liens obtained through "legal proceedings are avoided, in whatever part of the "suit or by whatever form of proceeding they are "created. If the lien is created by the levy, then the "lien of the levy is avoided; if created by the judgment, "then the lien of the judgment is avoided; if created "by the attachment, then the lien of the attachment is "avoided; but, *if the lien created by the attachment is* "*saved, that lien may be enforced by appropriate pro-* "*ceedings, even though such proceedings include a* "*judgment and levy made within the limited time.* I "am aware that this decision is in substantial conflict "with *In re Lesser*, 108 Fed., 201. With the utmost "respect for the learned and distinguished judge who "decided that case, I find myself unable to agree with 'him."

The opinion then refers to the opinion of the Circuit Court of Appeals in this case which was withdrawn when the case was certified to this Court.

The case of *In re Beaver Coal Co.*, 110 Fed. Rep., 630, follows *In re Blair* and declines to follow the District Court in this case.

The case of *Coal Co.* v. *Goodwin*, 95 Me., 246, also follows *Bowman* v. *Harding*, 56 Me., 559, and *Leighton* v. *Kelsey*, 57 Me., 85, above cited, and allows the entry of a judgment within the limited time enforceable only out of the attached property.

The cases of *Smith* v. *Gordon*, 2 N. Y. Leg. Obs., 325, and *Ex parte Waddell*, 1 Leg. Obs., 53, cited by the District Court, both rely upon *Ex parte Foster*, and their authority is limited by it. The former was de-

cided in Maine and needs no consideration. The latter was decided in the Southern District of New York and is in conflict with *Ex parte General Assignee, supra,* decided in the Northern District about the same time. It held that the filing of a creditor's bill created no lien superior to the rights of an assignee in bankruptcy, but the Court sent the assignee for the maintenance of his claim to the State Chancery Court. The assignee did apply to the Chancery Court to receive the funds discovered and secured in the judgment creditor's suits, but his application was there denied. His rights were examined at great length in

> *Storm* v. *Waddell,* 2 Sandf. Ch., 494, before cited,

where the Court reviewed all the authorities and reached an opposite conclusion from that of Judge Betts. The case is a leading one and has been continually followed and cited as authority, and since the time of its decision the question has not, so far as we are aware, been open to discussion. The present decision of the District Court is the first attempt to open it.

The case of *Edmonston* v. *McLoud,* 16 N. Y., 543, cited by the District Court as authority for its position, holds merely that the lien acquired by a creditor's bill does not relate back to earlier supplementary proceedings which had been abandoned, and that the two proceedings have no relation to each other.

The District Court seems to think that because the action in which the lien is procured may be abandoned, the lien has never been brought into actual existence. But any lien may be abandoned or lose its validity through lapse of time. It is not for that reason any the less a lien. That is true in the State of New York of a real estate mortgage after twenty years, or a chattel mortgage in one year, if not refiled, or a judgment on real estate in ten years, or an execution if a levy be not made or it be allowed to become stale (*Hathaway* v. *Howell,* 54 N. Y., 97). We doubt if the

Court would presume to say that these liens are inchoate until actually executed.

IV.—The Trustee takes the title subject to all equities, liens, or encumbrances, whether created by operation of law or by act of the bankrupt.

The Trustee represents simply the bankrupt and can take no rights which they did not have.

Yeatman v. *Savings Institution*, 95 U. S., 764.
Stewart v. *Platt*, 101 U. S., 731.

III.

The judgment in the creditors' action is not brought within the terms of Section 67f of the Bankruptcy Act.

Even if the petitioners lien were inchoate and depended upon the recovery of a judgment in the creditors' action, the lien was in fact perfected. This is so on three grounds:

1. The judgment of the Special Term of the State Court established the petitioners' rights more than a year before the filing of the petition in bankruptcy.

2. The judgment of the Appellate Division of the State Court was *obtained* more than four months prior to the filing of the petition in bankruptcy.

3. A judgment in a judgment creditor's action, whenever obtained, is not one avoided by the bankrupt act.

I.—*The judgment of the Special Term of the State Court on the 11th day of April, 1898, awarded the pe-*

titioners a complete judgment against the bankrupt and their transferees.

It adjudged that all the transfers were fraudulent and void as to the petitioners (Record, p. 2). It also adjudged that they were fraudulent and void as to the Receivers. As between the Receivers and the petitioners, the Court held that it should retain jurisdiction for the purpose of vesting title in the receivers and distributing the assets to the general creditors. *There was, therefore, as to the bankrupts and their transferees, a full and complete judgment in favor of the petitioners.* It was this earlier judgment, which is indisputably not within the four months' limitation, which fixed the petitioners' rights and therefore made certain the lien acquired by the commencement of the action.

The Appellate Division also held that the same transfers and conveyances were fraudulent and void as to the petitioners. They held further that whether they were or not so fraudulent and void as to the receivers, the receivers could not have any relief in that action. They also held that the receivership itself was fraudulent as to the petitioners, and they consequently gave the petitioners full relief as to the equitable assets in the receivers' hands.

The Trustee in Bankruptcy is in no position to claim that this judgment was the first judgment that gave the plaintiffs any relief. Upon this application he can only claim through the bankrupts (*Stewart* v. *Platt*, 101 U. S., 731; *Storm* v. *Waddell*, 2 Sand. Ch., 494), and they have been defeated from the commencement of the litigation. He may maintain an action to have the same transfers adjudged fraudulent as to him, although the bankrupts could not do so. But that is not his position here. Here he stands in the shoes of the bankrupts and must maintain that *they* were entitled to successfully defend the action, that the judgment of the Court never has been rendered, more than four months prior to the filing of the petition in bankruptcy, that their transfers were fraudulent and void. For, under the doctrine which the District Court seeks to maintain, the moment the fraud is established and the transfers made void by a judgment to that effect, the petitioners' right becomes fixed. The

bankrupts' defense is disposed of. The lien ceases to be inchoate and becomes absolute. The fact that the Court takes possession of the property for another purpose is immaterial from the point of view of the bankrupts and their trustee.

II.—*The judgment of the Appellate Division was obtained more than four months prior to the filing of the petition in bankruptcy.*

The judgment of the Appellate Division, which the District Court holds was the first effectual one, was in fact *obtained* or *rendered* on the 30th day of December, 1898, *four months and thirteen days before the filing of the petition in bankruptcy.* It is entitled an order, but it is the only paper which is signed by that Court, or which is kept in its records. A subsequent formal judgment is entered by the Clerk of the Supreme Court upon a certified copy of it transmitted from the Clerk of the Appellate Division. Its language is that "it is ordered and *adjudged*." The subsequent formal judgment follows its verbiage in all respects. (Record, p. 3.)

This paper is, we submit, a "judgment" within the meaning of §67f of the Bankrupt Act. That section reads:

"That all levies, judgments, attachments, or other "liens, *obtained* through legal proceedings against a "person who is insolvent, at any time within four "months prior to the filing of a petition in bankruptcy "against him, shall be deemed null and void in case he "is adjudged a bankrupt."

This is equivalent to an enactment that where the judgment is obtained more than four months before the filing of the petition, it shall remain in force.

Doe v. *Childress*, 21 Wall., 642.

The judgment in question was in fact *obtained* at least as early as the 30th day of December, 1898. It was not formally entered in the clerk's office—owing

to the delay occasioned by motions for reargument—until the 31st of January, 1899 (Record, p. 3). But that fact does not make it any the less a judgment "obtained" prior to the limited time.

Black on Judgments, §106:

"*The rendition of a judgment is the judicial act of* "*the court in* pronouncing the sentence of the law upon "the facts in controversy as ascertained by the pleadings and the verdict. *The entry of a judgment is a* "*ministerial act*, which consists in spreading upon the "record a statement of the final conclusion reached by "the court in the matter, thus furnishing external and "incontestable evidence of the sentence given, and designed to stand as a perpetual memorial of its action. "*It is the former, therefore, that is the effective result* "*of the litigation. In the nature of things, a judgment* "*must be rendered before it can be entered. And* "*not only that, but though the judgment be not entered* "*at all, still it is none the less a judgment.* The omission to enter it does not destroy it, nor does its vitality "remain in abeyance until it is put upon the record."

§110. "When a judgment has been rendered in a "cause, it becomes the duty of the clerk, according to "the usual practice, to make a record entry of it in an "official book kept for that purpose. * * * But, as "was stated in the beginning of this chapter, this proceeding is ministerial only, and is not essential to the "validity of the judgment itself. It is none the less the "judgment of the court because not entered by the "clerk."

§115. "It may therefore be stated as the modern rule "that the *form* of the judgment is not very material, provided that in substance it shows distinctly and not inferentially that the matter had been determined in "favor of one of the litigants, or that the rights of the "parties in litigation had been adjudicated."

Freeman on Judgments, §38.
Fish* v. *Emerson, 44 N. Y., 376.
Stephens* v. *Santee, 49 N. Y., 35.
Bradner* v. *Howard, 75 N. Y., 417.

Cooly v. *Patterson*, 52 Maine, 472.
Huntress v. *Hurd*, 72 Maine, 450.
Davis v. *Smith*, 79 Maine, 351.
Young v. *Dearborn*, 27 N. H., 324.
In re Newman, 75 Cal., 213.
Crim v. *Kessing*, 89 Cal., 478.

III.—*A judgment in a judgment creditor's action, whenever obtained, is not one avoided by the bankrupt act.*

Section 67f speaks of judgments obtained "*against* " *a person who is insolvent* * * * in case he is ad- " judged a bankrupt." The bankrupts are, it is true, parties to all creditors' actions. But the principal parties in such actions are the fraudulent transferees. It is they who are attacked, and it is the property in their possession which is sought to be recovered. There is no warrant in the section for avoiding a judgment against them. *The transferees are not persons against whom a petition has been filed.* The judgment is in effect one *in rem* and not against any *person*. It simply forecloses the rights of all claimants to the property affected by the action and subjects it to the payment of the creditor's adjudged claim. (*Storm* v. *Waddell*, 2 Sandf. Ch., 494.) What the section evidently contemplates is a money judgment against the bankrupt on which an execution may be levied on his property which will prevent the trustee from taking possession of it. But the money judgment in this case was entered nearly three years before the adjudication in bankruptcy. And there is no property of which the trustee can take possession. It is all claimed by other persons.

This was been so decided in two cases arising under the Act of 1898.

Doyle v. *Heath*, 47 Atl. Rep., 213; 4 Am. Bank. Rep., 705, Supreme Court of Rhode Island, Sep., 1900.

That Court holds that the *judgment* is not rendered void by §67f but only the lien created by the judgment. It also holds, as we have already shown *supra*, that the judgment in a creditor's action does not create a lien—the lien is created by the filing of the bill, and it quotes and approves

In re Kavanaugh, 99 Fed. Rep., 928, which says: "It appears to us to be evident that the language (of "§67f), properly construed, *was intended only to apply "to such judgments as of themselves created liens.* "* * * It seems to us that *a clear distinction "should be drawn between a judgment*, in this sense, "*upon a debt*,—a mere personal liability,—*and a decree* "of the chancellor *declaring the property rights of "parties* in a case like the one before us, *but which in "no way created a lien.* Particularly is this true, as "the action in the state court was brought upon a "judgment *in personam* obtained long before, and upon "which there had first been an execution and return of "*nulla bona. This was therefore an ancillary proceed-"ing in equity for the enforcement of a judgment at "law.*"

IV.

The petitioners' right is a property right (Haebler *v.* Myers, 132 N. Y., 363) vested long before the passage of the bankrupt law. Whether Congress may or may not constitutionally interfere with it under the provisions of the Constitution relating to the passage of bankrupt laws and in the face of the Fifth amendment, we shall not now stop to discuss. The petitioners' position is, we submit, plainly not affected by the act which Congress has passed. For, in the words of the Vice-Chancellor, in *Storm v. Waddell* (p. 504), "there is nothing in the "act which authorizes the inference that Congress in-"tended to give such a monstrous and unprecedented ef-"fect to it, as to take away rights, vested or acquired in

"good faith; whether they were legal or equitable ex-
"press liens, or constructive trusts."

We have already cited the remarks of Mr. Chief Justice Parker in *Kittredge* v. *Warren* to the same effect.

V.

The questions certified should be answered as follows:

The first and second in the negative.

The third in the affirmative.

If the Court should decide that the lien acquired by the creditors' action was inchoate merely, the fourth question should be answered in the affirmative and the fifth in the negative. The essential propositions of the fourth and fifth questions should be answered in the affirmative and negative respectively.

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